



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

March 6, 1939

Hon. L. J. Gittinger  
First Assistant Criminal District Attorney  
Bexar County  
San Antonio, Texas

Dear Sir:

Opinion No. 0-365  
Re: Application of Senate Bill No. 227,  
Chapter 214, Acts of 1935, 44th Leg.,  
I. e., Article 165a-1, Revised Civil  
Statutes.

Your letter of February 10th is hereby acknowledged received wherein you request an opinion pertaining to the above captioned bill. In paragraphs numbered 1 and 2 of your letter, you ask the following questions:

"1. Under such Statute, would it be lawful for the Commissioners' Court to perform such service by having the land owner deposit with some escrow agent in cash, before commencement of the work, the amount to be charged for the service, or is it necessary in every case that the land owner make the application provided by law and execute the lien contract?

"2. If it would be held in all cases that a contract is required could the Commissioners' Court take such contract, not record the same and when the work is completed and paid for release the land owner from any liability by virtue of such application."

Also, by separate letter under date of February 10th, you desire this Department to submit a contract form

applicable under said act and particularly as provided for in Section 5 thereof. The provision of Senate Bill No. 227, Chapter 214, Acts of 1935, 44th Legislature, and section 5 applicable, is set forth in Vernon's Annotated Texas Civil Statutes, 1925, under Article 165a-1, Section 5 and reads as follows:

"The Commissioners' Courts of the several counties may provide for the construction of improvements on the lands lying within their respective counties, in the nature of farm terraces, dikes, ditches, soil and water reservoirs, and other soil and water conservation and erosion prevention services, assessing the landowner with an assessment not to exceed the actual cost of labor, material, and fuel, and no charge shall be made for depreciation and/or other expenses. The amount so assessed against the landowner, shall be and remain a lien upon and against the lands upon which such money was used for any or all of the improvements mentioned in this section.

"The County Commissioners' Courts shall consult and advise with the County Farm Demonstrators, and/or employ other capable and experienced agent or agents, in the application and operation of this Act.

"The Commissioners' Court of the several counties cannot undertake the improvements hereon, unless the landowner petitions said Court so to do. Said courts must enter into a written contract with the landowner, for any and all of the improvements herein specified, provided that no contract can grant the landowner a period of more than ten years from date of the contract itself for payment to the Commissioners' Courts of assessments against said landowner in making the said improvements, and provided further that said assessments shall bear no interest until after maturity, said contract form to be drawn by the Attorney General's Department. Only one contract can be made with any individual landowner in any one calendar year, and not more

than Three Hundred (\$300.00) Dollars shall be spent per annum on any one farm. Such contracts shall be filed and recorded in the office of the County Clerk of the County in which the land is situated, and such filing shall serve to fix the lien on said land. Anyone receiving any benefits hereunder must be the owner of record of such land on which any improvements hereunder are to be made; provided further that nothing in this Act shall affect the existing statutes regarding impounding water reservoirs."

The purpose of this provision in the act as expressed in the enacting clause of the bill was to confer on the Commissioners' Court of the several counties authority to provide for the construction of improvements on lands in the nature of farm terraces, dikes, ditches and other services expressed; providing for assessing landowners for the construction and maintenance of such improvements and devices, under rules and regulations to be prescribed by the said conservation board; providing for the contribution by the landowners for such improvements, entering into contracts with the Commissioners' Court for same and other purposes more or less connected with the above.

It appears, in the reading of Section 5 of said act, that the Commissioners' Court shall enter into a written contract with the landowner for any and all of the improvements specified in said act. The act requires that such assessment be made, that a contract be entered into and a lien retained, thereby securing the funds of the county expended in such cases and which are to be paid back by the individual landowner.

The primary and cardinal purpose of this enactment was to create a fund and provide whereby the county, through its Commissioners' Court could, if it saw fit, expend a sum of money or its equivalent in labor, material and fuel to such a project, at the landowner's request and in such amount as not to exceed \$300.00 for the designated improvements in any one calendar year. Such sum available without interest and payments deferred, would be an inducement to having the work done by any landowner who desired

to avail himself of the privilege.. The act itself evidently contemplates that the county shall perform the work and the latter part of Section 6 of the act appears to leave it within the discretion of the Commissioners' Court to permit road machinery, when not necessarily in use on the public roads, to be used on private lands for purposes expressed. Such provisions are as follows:

"In order to provide a fund in aid of the construction and maintenance of the improvements and structures named in Section 5 of this Act, the Commissioners' Court of each county may appropriate any amount up to twenty-five (25%) per cent of the net collections made in each such county of the motor vehicle license fees not to exceed Twelve Thousand Five Hundred (\$12,500.00) Dollars.....Moneys may be withdrawn from said fund under the direction of the Commissioners' Courts, and used for the purposes of purchasing, maintaining and repairing machinery and equipment, and furnishing labor, and any such machinery so purchased by the county, and any road machinery owned by the county and not necessarily used on the public roads, may be used on private lands for the purpose of constructing and maintaining the improvements and structures in this Act provided."

The above provisions quoted, of the Acts of the 44th Legislature, are to be read with and considered in the light of the authority granted and as expressed in Article 2372c, Revised Civil Statutes, 1925, Acts of 1931, 42nd Legislature, Chapter 53, Section 4 of which act reads:

"In the public service of conserving the soil fertility of the lands of the County, the Commissioners' Courts shall have the authority to co-operate with the land owners and taxpayers of the County in all judicious efforts for the preservation of the productiveness of the soil from avoidable waste, and loss of productiveness of the soil from avoidable waste, and loss of productiveness of agricultural crops necessary to the public welfare, through permission to use the machinery and equipment that may

be made available by the County for such purposes under written contract, and the County shall receive from such landowners and taxpayers compensation, upon such uniform basis as may be deemed equitable, and proper, for the co-operation extended and services rendered, all such compensation or funds to the county to be paid into the Road and Bridge Fund of the County; and the County Commissioners' Court may provide for payments from landowners and taxpayers of the County at such stated intervals and in such amounts, as and when the County taxes are collected, as may be equitable, for the use of the equipment for the protection of lands against continuing immeasurable injury through soil erosion; provided that the Commissioners' Court or representative thereof shall not go upon the land of any owner to improve, terrace, protect, or ditch such lands until requested to do so in writing by such owner; and provided further, that the Commissioners' Court or representative thereof shall not be required to do such improving, terracing, protecting, and ditching unless such Court shall determine that such work is of some public benefit and said Court elects to do the work."

The Act of the 44th Legislature being enacted after the one last referred to and on the same general subject, its specific provisions will control and prevail over the prior act where its provisions are general - the two acts not necessarily conflicting. Such funds advanced for labor, material and fuel furnished under either provisions of our statutes must be done by written contract and orders duly made and entered upon the minutes of said court.

In Volume 11, Tex. Jur., Para. 95, p. 632, it is said the authority of the Commissioners' Court as the governing body of the county to make contracts in its behalf is strictly limited to that conferred either expressly or by fair or necessary implication by the Constitution and laws of the State. Also:

"In dealing with the county, it is necessary to have an express contract with the Commissioners' Court and that court can only speak

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by and through its minutes and records."  
Ferrier vs. Knox (Civ. App.) 33 SW 896,8.

We are unable to extend the import of the plain and unambiguous language used in these enactments to include an arrangement as expressed in your letter, portions of which are above set forth. The act provides for:

"Assessing the landowner with an assessment."

And unless a landowner desires to avail himself of this assessment with payments deferred and without interest, we can conceive of no such benefits added or accruing to his land by the use of county funds or amount assessed, when his own money which would adequately pay for and provide said improvements, is withheld in escrow.

We find no inhibition, of course, for the Commissioners' Court to perform said work after being petitioned, assessment made and a contract entered into, from accepting cash in payment of the assessment prior to the making of said improvements.

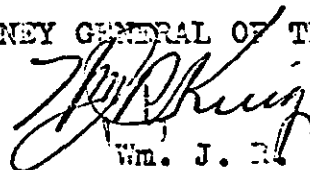
It is, therefore, the opinion of this Department that the Commissioners' Court would not be authorized to construct or provide for the construction of improvements as mentioned in Article 165a-1, Revised Civil Statutes and Section 5 thereof by allowing cash as security in lieu of a contract retaining a lien as provided therein and that it would be necessary that said lien, in all instances where payments are deferred, be filed and recorded.

In keeping with this opinion and as per your request, we herewith submit a form contract, bearing the approval of this Department, for such improvements as are desired to be made under the provisions of said Article 165a-1, Revised Civil Statutes and as provided in Section 5 thereof.

Very truly yours

ATTORNEY GENERAL OF TEXAS

BY



Wm. J. R. King  
Assistant

WJK:AW

ENCLOSURE

APPROVED: 

ATTORNEY GENERAL OF TEXAS